

What Would Justice Holmes Do (WWJHD)?: Rehnquist's *Plessy* Memo, Majoritarianism, and *Parents Involved*

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As a law clerk to Justice Robert H. Jackson in December 1952, William Rehnquist wrote a memo during the oral arguments in *Brown* defending *Plessy v. Ferguson*. "I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by my 'liberal' colleagues, but I think *Plessy v. Ferguson* was right and should be re-affirmed," Rehnquist wrote.¹ The memo resurfaced nearly twenty years later in *Newsweek* magazine on the eve of Senate floor debates over Rehnquist's Supreme Court nomination.² Rehnquist's explanation for the memo—that it reflected Jackson's views and not his own³—satisfied a majority of the U.S. Senate in

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¹ A Random Thought on the Segregation Cases, Memorandum from William Rehnquist to Justice Robert H. Jackson 1, (December 1952), Robert Houghwout Jackson Papers, Library of Congress, Manuscript Division [hereinafter Jackson Papers], Box 184, Folder 5 [hereinafter A Random Thought] (reprinted at Appendix, *infra*).

² *Supreme Court: Memo from Rehnquist*, NEWSWEEK, Dec. 13, 1971, at 32. The article was released on December 5, after Rehnquist had testified before the Senate Judiciary Committee, after a majority of the committee had voted favorably on his nomination, but immediately before the floor debates began.

³ On December 8, 1971, Rehnquist wrote a letter to Senate Judiciary Committee chairman James O. Eastland (D-Miss.) explaining that the memo "was prepared by me at Justice Jackson's request; it was intended as a rough draft of a statement of *his* views at the conference of the Justices, rather than as a statement of my views." 117 CONG. REC. 45,440 (1971) (emphasis in original). In 1986, Rehnquist testified for the first time about the memo under oath. Senator Edward Kennedy (D-Mass.) asked him about that sentence:

Kennedy: Do you the "I's" refer to you, Mr. Rehnquist?

Rehnquist: No, I do not think they do.

Kennedy: You maintain the "I's" refer to then Justice Jackson?

1971 and again in 1986 but sparked more than thirty years of highly-politicized debate about whether Rehnquist lied. Legal scholars who have written about the credibility of his explanation tend to fall into anti- and not-so-anti Rehnquist camps.⁴

Rehnquist's explanation for his *Plessy* memo began what I have previously referred to as the conservative canonization of *Brown*.⁵ Rehnquist recognized, having worked on the failed Supreme Court nominations of Clement Haynsworth and G. Harrold Carswell as the head of Nixon's Office of Legal Counsel and seeing his own nomination to the Court jeopardized because of the publication of his *Plessy* memo, that one could not disagree with the validity of *Brown* in 1971 and be part of the constitutional conversation. By agreeing with *Brown*'s validity,⁶ Rehnquist got himself confirmed to the Court, maintained the opportunity to influence *Brown*'s interpretation, and in the process helped move *Brown* from the lower to the upper canon. *Brown* became untouchable, not with the dawning of affirmative action,⁷ but because of the desire of Rehnquist and other conservative Supreme Court nominees to get confirmed. Rehnquist began a

Rehnquist: Yes. Obviously something for him to say.

Nomination of Justice William Hubbs Rehnquist: Hearings Before the S. Comm. on the Judiciary, 99th Cong. 323 (1986) [hereinafter Rehnquist CJ Hearings].

⁴ For the anti camp, see MICHAEL KLARMAN, FROM JIM CROW TO CIVIL RIGHTS 304–09 (2004); WILLIAM M. WIECEK, 12 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE BIRTH OF THE MODERN CONSTITUTION: THE UNITED STATES SUPREME COURT, 1941–1953, at 420, 689, 691, 696–703 (2006); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 607–09 n.* (1976); Gregory S. Chernack, *The Clash of Two Worlds: Justice Robert H. Jackson, Institutional Pragmatism, and Brown*, 72 TEMP. L. REV. 51, 54 n. 21 (1999); Laura K. Ray, *A Law Clerk and His Justice: What William Rehnquist Did Not Learn from Robert Jackson*, 29 IND. L. REV. 535, 553–59 (1996); Bernard Schwartz, *Chief Justice Rehnquist, Justice Jackson and the Brown Case*, 1988 SUP. CT. REV. 245, 245–47. For the not-so-anti camp, see MARK TUSHNET, A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW 20–21 (2005); Saul Brenner, *The Memos of Supreme Court Law Clerk William Rehnquist: Conservative Tracts, or Mirrors of his Justice's Mind?*, 76 JUDICATURE 77, 79–81 (1993); Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948–1958*, 68 GEO. L.J. 1, 40 (1979); Mark Tushnet with Katya Lezin, *What Really Happened in Brown v. Board of Education*, 91 COLUM. L. REV. 1867, 1880 (1991).

⁵ Brad Snyder, *How the Conservatives Canonized Brown v. Board of Education*, 52 RUTGERS L. REV. 383, 385 (2000).

⁶ Rehnquist concluded his 1971 letter to Senator Eastland by expressing his support for “the legal reasoning and the rightness from the standpoint of fundamental fairness of the *Brown* decision.” 117 CONG. REC. 45,440 (1971).

⁷ Mark A. Graber, *The Price of Fame: Brown as Celebrity*, 69 OHIO ST. L.J. 945, 977 (2008).

pattern of Supreme Court nominees endorsing *Brown* that continued with originalists such as Robert Bork and Clarence Thomas and persists to this day.

Lost amid the debate about whether Rehnquist lied or in the legal scholarship about *Brown*'s exalted place in the constitutional canon is the important legal argument in Rehnquist's *Plessy* memo. Rehnquist's memo is more than just a relic from a time when reasonable people could disagree about the validity of *Brown*. It makes a popular argument against the Court's school desegregation decisions both before and after *Brown*, an argument that permeated Rehnquist's own jurisprudence, and an argument often associated with Justice Oliver Wendell Holmes—deference to majority rule.

Holmes was a skeptic. He believed in the idea that there should be no dominant idea. As a Civil War veteran, Holmes believed healthy competition among ideas could prevent future wars, disunion, and bloodshed.⁸ As a Supreme Court Justice, Holmes's skepticism led to his majoritarian jurisprudential philosophy. Holmes preferred ideas to compete with each other in the democratic political process. The voters, not Holmes or eight other Justices, should decide whether an idea was good or bad; new ideas could come and go based on which elected officials were voted in or out of office.⁹ Sometimes Holmes's majoritarian philosophy revealed his lack of sympathy toward politically disenfranchised minorities¹⁰ and the less

⁸ See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas."). See also *United States v. Schwimmer*, 279 U.S. 644, 654–55 (1929) (Holmes, J., dissenting) ("[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought – not free thought for those who agree with us but freedom for the thought we hate."); *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) ("If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.").

⁹ See, e.g., LOUIS MENAND, *THE METAPHYSICAL CLUB* 3–4, 61–67 (2001).

¹⁰ For Holmes's lack of sympathy toward African-Americans, see *McCabe v. Atchison, Topeka & Santa Fe Ry.*, 235 U.S. 151, 164 (1914); *United States v. Reynolds*, 235 U.S. 133, 150 (1914) (Holmes, J., concurring); *Bailey v. Alabama*, 219 U.S. 219, 245 (1911) (Holmes, J., dissenting); *Giles v. Harris*, 189 U.S. 475, 486 (1903); G. EDWARD WHITE, *JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF* 333–43 (1993); ALBERT W. ALSCHULER, *LAW WITHOUT VALUES* 56–58 (2000); Yosai Rogat, *Mr. Justice Holmes: A Dissenting Opinion*, 15 STAN. L. REV. 254, 255 (1963).

In *McCabe*, the Court struck down part of an Oklahoma "separate-but-equal" statute on equal protection grounds because the statute failed to require railroad companies to provide separate sleeping and dining cars for black passengers. 235 U.S. at 159. Holmes concurred in the result, which dismissed the case on technical grounds. *Id.* at 164. See also Letter from Charles Evans Hughes to Holmes, Nov. 29, 1914, in ALEXANDER M.

fortunate.¹¹ But by deferring to majority rule, Holmes seemed to be at peace. “[I]f my fellow citizens want to go to Hell I will help them,” he wrote Harold Laski. “It’s my job.”¹²

During the last four decades, conservatives have mostly abandoned Holmesian deference to majority rule as an argument against school desegregation. Liberals, however, have embraced this argument in support of affirmative action and other programs designed to promote racial and ethnic diversity. This role reversal was particularly evident in the dueling opinions of Chief Justice John Roberts and Justice Stephen Breyer in *Parents Involved*. The majoritarian argument in Rehnquist’s *Plessy* memo is worth revisiting because it continues to factor into the modern debate about the interpretation and implications of *Brown*.

BICKEL & BENNO C. SCHMIDT, JR., 9 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE JUDICIARY AND RESPONSIBLE GOVERNMENT, 1910–1921 (1984) (returning Holmes’s memo on the case, reading the statute as not requiring “separate-but-equal” sleeping cars for blacks, and suggesting that Holmes’s reading of the Equal Protection Clause did not prohibit discrimination on the basis of race).

Holmes also drafted, but did not publish, a dissent from the Court’s unanimous decision in *Buchanan v. Warley*, 245 U.S. 60 (1917), which invalidated a Louisville statute requiring residential segregation. See Holmes Draft Dissent, in Oliver Wendell Holmes Jr. Papers, Harvard Law School, Series XX, Box 80, Folder 12; BICKEL & SCHMIDT, *supra*, at 592. For analysis of Holmes’s dissent, see *id.* at 804–10.

White concluded:

Given Holmes’s positivism, lack of humanitarian sympathies, exposure to racial stereotypes, limited contact with black persons, and age at the time he was deciding Supreme Court cases, there was no reason to suspect that he would be sympathetic to the legal position of blacks or inclined to treat the Equal Protection Clause as a mandate for substantive equality.

WHITE, *supra*, at 342.

For a defense of Holmes’ character in the context of the times, see Richard A. Posner, *Introduction* to THE ESSENTIAL HOLMES xxviii (Richard A. Posner ed., Univ. of Chicago Press 1992) (“The picture of Holmes as a reactionary monster is an enormous distortion. It is true that after his youthful abolitionist phase he displayed no marked sympathy for black people; but he was remarkably unprejudiced for his time. . .”).

¹¹ See *Buck v. Bell*, 274 U.S. 200, 206–07 (1927) (permitting the state of Virginia to sterilize Carrie Buck, who was institutionalized because she was an unwed mother, not because she was “feeble-minded,” as the state and Holmes contended). “Three generations of imbeciles are enough,” Holmes concluded. *Id.* at 207. For a compelling account of the Court’s decision in *Skinner v. Oklahoma* striking down Oklahoma’s compulsory sterilization law, see generally VICTORIA F. NOURSE, IN RECKLESS HANDS: *SKINNER V. OKLAHOMA* AND THE NEAR TRIUMPH OF AMERICAN EUGENICS (2008).

¹² 1 HOLMES-LASKI LETTERS 249 (Mark DeWolfe Howe ed., 1953).

I. CHANNELING JUSTICE HOLMES

A. *The Memo*

Rehnquist's memo reads like he is paying homage to Holmes and deference to majority rule.¹³ One and a half pages long and titled "A Random Thought on the Segregation Cases," Rehnquist's memo builds to the argument that the Justices should defer to majority rule and not read their personal preferences into the meaning of the Fourteenth Amendment. In the first few paragraphs, Rehnquist reviewed the Court's history beginning with

¹³ The roots of Rehnquist's majoritarian judicial philosophy are unclear. In "Contemporary Theories of Rights," his Stanford master's thesis in political science, the atrocities of World War II caused him to question the limits of majority political rule in protecting minority rights. See William Hubbs Rehnquist, *Contemporary Theories of Rights*, 58 STAN. L. REV. 1997, 2044-45 (2006) (reprinting M.A. Thesis, August 1948). "There is little reason to believe that Hitler's regime or Stalin's regime were not approved by the majority of the people living under them . . .," he wrote. *Id.* at 2045. "They failed to realize that the system of majority rule, if it is not to be extremely short-lived, must recognize the rights of the minority." *Id.*

Rehnquist the political theorist seemed less enamored of majority rule and more protective of minority rights than Rehnquist the law clerk, Rehnquist the Justice Department official, or Rehnquist the Supreme Court Justice. Perhaps, as former Rehnquist law clerk Douglas Kmiec speculated, Rehnquist would simply explain it as "different jobs." Douglas W. Kmiec, *Young Mr. Rehnquist's Theory of Moral Rights—Mostly Observed*, 58 STAN. L. REV. 1827, 1847 (2006).

The major intervening event between Rehnquist's Stanford M.A. thesis and his clerkship (apart from an unhappy year in political science graduate school at Harvard) was his three years at Stanford Law School. During his second year, Rehnquist's constitutional law professor was Stanley Morrison, Holmes's former legal secretary (law clerk in those days) during the 1919 Supreme Court term. Morrison, who practiced law in San Francisco while teaching at Stanford, definitely imparted to Rehnquist and other students and professors the importance and influence of Holmes. Philip Kurland, a visiting professor at Stanford during the summer of 1951, wrote to Frankfurter:

Stanley Morrison is an excellent example of how a Holmesian disciple can turn Holmesian skepticism into dogma. If Holmes once said that the Germans were a warlike race, not only is that issue settled for Stanley, but it necessarily follows that all Germans are warlike, that we must maintain a ball and chain on each and every person in that country. . . . Moreover, "clear and present danger" is not only a useful phrase to express a thought, but an ultimate test that any objective observer can apply to any given situation and come out with but a single answer.

Letter from Philip Kurland to Felix Frankfurter, Aug. 15, 1951, at 1-2. Felix Frankfurter Papers, Harvard Law School, Box 186, Folder 8, Reel 17, at 118-119.

The other explanation, of course, is that Rehnquist was appealing to Justice Jackson's beliefs in majority rule. See *infra* Section I.C.

its 1803 *Marbury v. Madison* decision establishing the Court's power of judicial review to strike down laws that conflict with the Constitution. "This was presumably on the basis that there are standards to be applied other than the personal predilections of the Justices," he wrote. In the second and third paragraphs, he argued that the Court had been more successful in resolving disputes between federal branches and between states than in resolving disputes between individuals and the government. Rehnquist discussed the Court's decision in *Lochner v. New York* that struck down a New York law setting maximum hours for bakers by reading a "liberty of contract" theory into the Fourteenth Amendment's Due Process Clause. "[To the] majority opinion in that case," he wrote, "Holmes replied that the Fourteenth Amendment did not enact Herbert Spencer's Social Statics."¹⁴ For the next thirty years, Rehnquist wrote, the Justices read their pro-business views into the Constitution until the Court's "switch in time" saved Roosevelt's New Deal programs. Of the Court's switch, Rehnquist wrote: "Apparently, it recognized that where a legislature was dealing with its own citizens, it was not part of the judicial function to thwart public opinion except in extreme cases."¹⁵

Rehnquist concluded his memo with the following two paragraphs:

In these cases now before the Court, the Court is, as [John W.] Davis suggested, being asked to read its own sociological views into the Constitution. Urging a view palpably at variance with precedent and probably with legislative history [sic], appellants seek to convince the Court of the moral wrongness of the treatment they are receiving. I would suggest that this is a question the Court need never reach; for regardless of the Justice's individual views on the merits of segregation, it quite clearly is not one of those extreme cases which commands intervention from one of any conviction. If this Court, because its members individually are "liberal" and dislike segregation, now chooses to strike it down, it differs from the *McReynolds* court only in the kinds of litigants it favors and the kinds of special claims it protects. To those who would argue that "personal" rights are more sacrosanct than "property" rights, the short answer is that the Constitution makes no such distinction. To the argument by Thurgood, not John, Marshall that a majority may not deprive a minority of its constitutional right, the answer must be made that while this is sound in theory, in the long run it is the majority who will determine what the constitutional rights of the minority are. One hundred and fifty years of attempts on the part of this Court to protect minority rights of any kind—

¹⁴ A Random Thought, *supra* note 1, at 1 (referring to *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting)). Holmes was referring to the British political philosopher's laissez-faire economic theories. See generally, HERBERT SPENCER, SOCIAL STATICS (1851).

¹⁵ A Random Thought, *supra* note 1, at 1.

whether those of business, slaveholders, or Jehovah's Witnesses—have all met the same fate. One by one the cases establishing such rights have been sloughed off, and crept silently to rest. If the present Court is unable to profit by this example, it must be prepared to see its work fade in time, too, as embodying only the sentiments of a transient majority of nine men.

I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by my "liberal" colleagues, but I think *Plessy v. Ferguson* was right and should be re-affirmed. If the Fourteenth Amendment did not enact Spencer's *Social Statics*, it just as surely did not enact Myrdahl's [sic] *American Dilemma* [sic].¹⁶

Rehnquist concluded his memo with a typewritten "whr."¹⁷

The scholarly focus on Rehnquist's memo gravitated toward its penultimate and most inflammatory sentence endorsing the rightness and reaffirmation of *Plessy*. But the last sentence alluding again to Holmes's *Lochner* dissent is more central to Rehnquist's argument: the Justices should refrain from reading their personal views into the Fourteenth Amendment, in this case the Equal Protection Clause, and defer to majority rule on the issue of school segregation.

B. Inspired by John W. Davis

The ideas in Rehnquist's memo did not come out of thin air. Much of what has been written about his memo has been devoid of context because the memo is undated, and Justice Jackson does not respond to Rehnquist's memo or another undated memo written by his co-clerk, Donald Cronson. Rehnquist's memo is entirely different in style from Cronson's. Aside from referencing a few very common case names, Rehnquist included no direct quotations from those cases and no citations to any U.S. Reports. It was much shorter than Cronson's memo, six paragraphs compared to Cronson's eleven, one and a half single-spaced pages compared to Cronson's three. Rehnquist obviously wrote his memo off the top of his head. But it was not, as the title suggests, "A Random Thought."

The substance of the memo gives away where Rehnquist's "random thought" came from and when it was written—not in response to Cronson's memo but as a reaction to John W. Davis's and Thurgood Marshall's December 10, 1952 oral argument in the school desegregation cases. Cronson, Rehnquist, and many of the other law clerks attended the unusual three days of argument. The must-see argument of the five cases was the showdown in the South Carolina case, *Briggs v. Elliott*. Marshall argued on

¹⁶ *Id.* at 1–2.

¹⁷ *Id.*

behalf of the black South Carolina school children and their parents. To respond to Marshall, South Carolina Governor James F. Byrnes, a former one-term Supreme Court Justice, hired Davis. The 79-year-old Davis had argued nearly 140 Supreme Court cases and had recently won the *Steel Seizure* case on behalf of the steel companies—even Marshall was in awe of him. Marshall versus Davis was the main event. On December 9, Marshall argued from 3:15 P.M. until the Court recessed at 4:30 P.M. The next day, Davis began at 12:10 P.M. followed by Marshall's 15-minute rebuttal.¹⁸

Rehnquist's memo riffs on the December 10 argument between Davis and Marshall. The first four paragraphs build up to Davis's argument that the Justices should not decide the school desegregation cases based on their personal preferences and that the decision should be left up to popularly-elected legislators and school board officials. In the second to last paragraph of his memo, Rehnquist directly referenced the December 10 argument. In the first sentence, he wrote: "[T]he court is, as Davis suggested, being asked to read its own sociological views in the Constitution."¹⁹ Indeed, midway through his argument on December 10, Davis quoted Judge John J. Parker's lower court opinion: "*The members of the judiciary . . . have no more right to read their ideas of sociology into the Constitution than their ideas of economics.*"²⁰ Davis's quotation of Parker's opinion is critical—it alludes to

¹⁸ See e.g., KLUGER, *supra* note 4, at 529; Interview by Richard Kluger with Thurgood Marshall, Charlottesville, Va. (Oct. 26, 1966), at 8, *Brown v. Board of Education* Papers, Sterling Memorial Library, Yale University, Box 4, Folder 65 ("John W. Davis! He was the greatest Solicitor General we ever had. You and will never see a better one. He was the greatest.' (Marshall said the above at four times during fifteen minutes.)).

¹⁹ A Random Thought, *supra* note 1, at 2.

²⁰ 49 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW (BROWN V. BOARD OF EDUCATION) 334 (Philip B. Kurland & Gerhard Casper eds., 1975) (hereinafter LANDMARK BRIEFS AND ARGUMENTS) (quoting *Briggs v. Elliott*, 98 F. Supp. 529, 537 (E.D.S.C. 1951) (emphasis added)).

Rehnquist's memo does not contain any citations to the briefs, but he also may have picked up on these ideas in the state of South Carolina's brief. Judge Parker's lower court opinion is quoted at length in the state of South Carolina's brief as follows:

To this we may add that, when seventeen states and the Congress of the United States have for more than three quarters of a century required segregation of the races in the public schools, and when this has received the approval of the leading appellate courts of the country including the unanimous approval of the Supreme Court of the United States [in *Gong Lum v. Rice*] at a time when that court included Chief Justice Taft and Justices Stone, Holmes, Brandeis, it is a late day to say that such segregation is violative of fundamental constitutional rights. It is hardly reasonable to supposed that legislative bodies over so wide a territory, including the Congress of the United States, and great judges of high courts have knowingly defied the Constitution for so long a

Holmes's *Lochner* dissent by referring to economics and plants the seeds for the ideas in Rehnquist's memo. A few sentences later, Rehnquist wrote: "To the argument by Thurgood, not John, Marshall that a majority may not deprive a minority of its constitutional rights, the answer must be made that while this is sound in theory, in the long run it is the majority who will determine what the constitutional right of the minority are."²¹ Early in his rebuttal, Marshall said: "[U]nder our form of government, these individual rights of minority people are not to be left to even the most mature judgment of the majority of the people, and that the only testing ground as to whether or not individual rights are concerned is in this Court."²² At the end of Marshall's rebuttal, Justice Stanley Reed asked him whether this problem should be resolved by the Court or by legislation. Marshall replied: "I think, sir, that the ultimate authority for the asserted right by an individual in a minority group is in a body set aside to interpret our Constitution, which is our Court."²³

Rehnquist made a final reference to the December 10 oral argument in the last sentence of this memo in which he wrote: "If the Fourteenth Amendment did not enact Spencer's *Social Statics*, it just as surely did not enact Myrdahl's [sic] *American Dilemma* [sic]."²⁴ Rehnquist's reference to Swedish social economist Gunnar Myrdal's 1944 study of the economic, sociological, and psychological effects of racial segregation on American life came directly from the December 10 argument. Near the end of his argument, John W. Davis proposed adopting portions of Myrdal's work selectively quoted in the state of South Carolina's briefs.²⁵ During Marshall's rebuttal, Myrdal's work came up again. "Can I take judicial notice of Myrdal's book without having called him as a witness?" Justice Frankfurter asked. "Yes, sir," Marshall replied. "But I think when you take judicial notice of Gunnar Myrdal's book, we have to read the matter, and not take

period or that they have acted in ignorance of the meaning of its provisions. The constitutional principle is the same now that it has been through this period; and if conditions have changed so that segregation is no longer wise, this is a matter for the legislatures and not for the courts. The members of the judiciary have no more right to read their ideas of sociology into the Constitution than their ideas of economics.

Brief for Appellees, *Briggs v. Elliott*, Oct. 3, 1952, at 18.

²¹ A Random Thought, *supra* note 1, at 2.

²² LANDMARK BRIEFS AND ARGUMENTS, *supra* note 18, at 339.

²³ *Id.* at 346.

²⁴ A Random Thought, *supra* note 1, at 2.

²⁵ LANDMARK BRIEFS AND ARGUMENTS, *supra* note 20, at 337–38. See also Brief for Appellees at 32–33, *Briggs v. Elliott*, 342 U.S. 350 (1952) (No. 273) (citing 6 GUNNAR MYRDAL, AN AMERICAN DILEMMA 901–02 (1944)).

portions out of context. Gunnar Myrdal's whole book is against the argument."²⁶

Judging by the numerous textual references to the December 10 oral argument between Davis and Marshall and the lack of direct quotes and citations to cases or the briefs, Rehnquist probably returned to Jackson's chambers immediately after the oral argument and dashed off a page and a half of "random thoughts" about the segregation cases. Rehnquist was inspired by Davis's argument that the Justices should not read their own sociological views into the Equal Protection Clause of the Fourteenth Amendment, an argument that he thought would appeal to Justice Jackson.

C. Appealing to Justice Jackson

Putting aside the question of whether the memo's conclusion reflected his own beliefs,²⁷ Rehnquist wrote the memo in part because the majoritarian argument appealed to Justice Jackson. Jackson lived through Roosevelt's court-packing fight after the Court had struck down the administration's New Deal programs. Jackson felt so strongly that the Justices should not read their own views into the Constitution and usurp majority rule that he wrote a book about it, *The Struggle for Judicial Supremacy*.²⁸ Jackson learned another lesson from 1945 to 1946 as the chief U.S. prosecutor of Nazi war criminals at Nuremberg—that one of the first things Hitler did in his rise to power was abolish state and local governments. Jackson believed that the Founding Fathers had left power to states and municipalities as a means of preventing totalitarianism.²⁹ He was reluctant, therefore, to use the Court's interpretation

²⁶ LANDMARK BRIEFS AND ARGUMENTS, *supra* note 20, at 341. Marshall discussed Myrdal in much greater detail at oral argument than he did in the *Briggs* briefs, where he merely cited Myrdal's book in a footnote to support the notion that racial segregation created a "badge of inferiority." Brief for Appellants at 24 & n.4, *Briggs v. Elliott*, 342 U.S. 350 (1952) (No. 273) (citing 1 GUNNAR MYRDAL, AN AMERICAN DILEMMA 614, 640 (1944)).

²⁷ Rehnquist's beliefs about *Plessy* and his complex relationships with Jackson, Cronson, and the other law clerks from the 1951 and 1952 terms are beyond the scope of this paper, but they will be addressed in a forthcoming chapter about Rehnquist's clerkship experience with Jackson.

²⁸ ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 313 (1941) ("The Court has as its highest responsibility the duty to uphold every such movement, in its legislative and executive phases, within all express bounds of the Constitution."). For the most comprehensive account of the Jackson-Roosevelt relationship, see ROBERT H. JACKSON, THAT MAN: AN INSIDER'S PORTRAIT OF FRANKLIN D. ROOSEVELT 135–55 (John Q. Barrett ed., 2004).

²⁹ See Jackson interview with Harlan Phillips, at 397, Columbia Oral History Project, in Jackson Papers, Box 190, Folder 4.

of the Fourteenth Amendment to overrule the decisions of state and local governments.

Rehnquist's efforts to tap into Jackson's commitment to majority rule were not limited to *Brown*. In *Terry v. Adams*,³⁰ black voters in East Texas sued over the all-white Jaybird Democratic Primary run by the private Jaybird Democratic Club. The club consisted of all the whites in Fort Bend County, Texas, and for nearly 60 years, the winner of its primary always captured both the Democratic nomination and elected office.³¹ The Supreme Court had outlawed the all-white primary in *Smith v. Allwright*,³² but the Fourteenth Amendment protects blacks only from state-sponsored discrimination. The court of appeals held that the black voters in *Terry v. Adams* lacked the "state action" requirement.³³ Jackson was one of three Justices who voted not to hear the case, but the Court decided to hear it anyway.³⁴

After Black and Frankfurter circulated opinions favoring the black voters, Rehnquist wrote a memo analyzing their work product and actively encouraging Jackson to dissent. Rehnquist summarized Black and Frankfurter's opinions in a paragraph each, and then wrote the following paragraph in which he attempted to summarize Jackson's views:

(3) Your ideas – the constitution does not prevent the majority from banding together, nor does it attain success in the effort. It is about time the Court faced the fact that the white people on [sic] the South don't like the colored people; the [C]onstitution restrains them from effecting this dislike thru state action, but it most assuredly [sic] did not appoint the Court as a sociological watchdog to rear up every time private discrimination raises its admittedly ugly head. To the extent that this decision advances the frontier of state action and "social gain", it pushes back the frontier of freedom of association and majority rule. Liberals should be the first to realize, after the past twenty years, that it does not do to push blindly through towards one constitutional goal without paying attention to other equally desirable values that are being trampled on in the process.³⁵

Rehnquist concluded the memo by urging Jackson to use these views to write a dissent: "This is a position that I am sure ought to be stated; but if stated by Vinson, Minton, or Reed it just won't sound the same as if you state

³⁰ *Terry v. Adams*, 345 U.S. 461 (1953).

³¹ *Id.* at 463.

³² *Smith v. Allwright*, 321 U.S. 649 (1944).

³³ *Terry*, 345 U.S. at 463.

³⁴ *No. 52 Terry v. Adams*, at 1, Jackson Papers, Box 179, Folder 9.

³⁵ Memorandum from William H. Rehnquist, Regarding the Opinions of Justices Black and Frankfurter in *Terry v. Adams*, at 1, Jackson Papers, Box 179, Folder 9.

it."³⁶ Jackson initially took Rehnquist's advice. At the Justices' first conference on *Terry v. Adams*, he voted against the black voters.³⁷ He told the other Justices that the Fourteenth Amendment only prevents states from rigging elections along color lines, and nothing prevents people from associating in private groups along color, nationalistic, or religious lines.³⁸ The majority has a right to meet. If Congress wants to do something about it, it can.³⁹ On April 3, 1953, Jackson wrote a nine-page dissent beginning with the following two paragraphs:

The result which the Court reaches is consistent with my political views and my crude concept of sociology. If it is accepted in good part, it will probably be an improvement in race relations in the little area affected. It is certain to be widely approved where it is not operative, and where it is, its acceptance is more doubtful. But if I were choked to death for saying so, I would still have to affirm that it is not good law.

The Jaybirds have a hateful little local scheme, and what happens to it would cause me worry. But unfortunately, in 1937, I participated in a struggle led by Franklin D. Roosevelt to keep this Court from writing its own views into the law of the land on the pretense that they were distilled from the Constitution. It is true that on most of these issues the Court has changed sides; but I still happen to believe that it is not a function of the judiciary to read its political, sociological views into constitutional law. That is what is being done here.⁴⁰

Jackson never circulated his dissent, and 11 days later he changed his mind. He wrote a three-page draft concurrence finding for the black voters under the Fifteenth Amendment, which protected the right to vote from racial discrimination and contained no state action requirement, and the Court's 1944 *Smith v. Allwright* decision banning all-white primaries. Instead of circulating his opinion, Jackson joined Justice Clark's concurring opinion.⁴¹ The black voters won, but the Court was fractured among several opinions, none of which attracted a five-justice majority.

Jackson had been thinking about these issues since the 1949 term when the Court had granted certiorari in three graduate school segregation cases: the University of Texas law school's refusal to admit Heman Sweatt,⁴² the

³⁶ *Id.*

³⁷ See *supra* note 34; *Terry v. Adams* Docket Sheet, Jackson Papers, Box 179, Folder 9.

³⁸ *Terry v. Adams* Docket Sheet, *supra* note 37.

³⁹ *Id.*

⁴⁰ Draft Dissent, Apr. 3, 1953, Jackson Papers, Box 179, Folder 9.

⁴¹ *Terry*, 345 U.S. at 477 (Clark, J., concurring).

⁴² *Sweatt v. Painter*, 339 U.S. 629 (1950).

University of Oklahoma's decision to put George McLaurin in a separate room from white graduate students,⁴³ and the Southern Railway's refusal to seat Elmer Henderson in a dining car.⁴⁴ These cases forced Jackson and the Court to confront the constitutionality of *Plessy* and racially "separate-but-equal" facilities.

In September 1949, Jackson turned for help not to his law clerks but to the nation's legal expert on the history of the Fourteenth Amendment, Stanford law and political science professor Charles Fairman. Fairman's seminal article in the *Stanford Law Review* disagreed with Justice Black's theory that the Fourteenth Amendment incorporated the Bill of Rights.⁴⁵ Jackson felt a kinship with Fairman, who, as a member of the Judge Advocate General's office in Frankfurt, had worked with Jackson at Nuremberg. "You and I have seen the terrible consequences of racial hatred in Germany," Jackson wrote Fairman. "We can have no sympathy with racial conceits which underlie segregation policies."⁴⁶ Jackson confided to Fairman his concerns about the Court's institutional role vis-à-vis elected branches of government. "The problem in my mind is not merely should we nine decide this case, but should such an institution decide such questions for the Nation," he wrote Fairman.⁴⁷

At the Justices' April 8, 1950 conference about the graduate school cases, Jackson warned them that these cases "can do more harm than any other case."⁴⁸ Jackson's primary concern was the institutional role of the

⁴³ *McLaurin v. Oklahoma*, 339 U.S. 637 (1950).

⁴⁴ *Henderson v. United States*, 339 U.S. 816 (1950).

⁴⁵ Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights: The Original Understanding*, 2 STAN. L. REV. 5 (1949).

⁴⁶ Letter from Robert Jackson to Charles Fairman, Mar. 13, 1950, at 2, Jackson Papers, Box 12, Folder 10.

⁴⁷ *Id.* In his Holmes-Devise history of the Stone and Vinson Courts, William Wiecek found Jackson's March 13, 1950, letter so fascinating that he reprinted it in full in the appendix. See WIECEK, *supra* note 4, at 713–15. "No one," Wiecek wrote, "neither I nor his 1952 law clerk William H. Rehnquist, could provide as authentic an expression of Jackson's thoughts as the Justice himself." *Id.* at 689 n.125. But, as people sometimes did in letters (and a few other Justices did about *Brown*), Jackson may have been writing for history as much as he was to Fairman.

⁴⁸ Burton Conference Notes on *Henderson* at 2, Harold Hitz Burton Papers, Library of Congress, Manuscript Division [hereinafter Burton Papers], Box 181, Folder 14; Douglas Conference Notes on *Henderson* at 3, William O. Douglas Papers, Library of Congress, Manuscript Division, Box 196, Folder No. 25(s) [hereinafter Douglas Papers]; accord THE SUPREME COURT IN CONFERENCE (1940–1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS 637–60 (Del Dickson ed., 2001) (using Justices' notes to recreate conference discussions in *Sweatt*, *McLaurin*, and *Brown*).

Court.⁴⁹ He said the history of the Fourteenth Amendment did not address segregated schools, Congress had not addressed the issue, and he wondered whether it was the Court's proper role to make social policy.⁵⁰ The Justices, Jackson said, would be effectively amending the Constitution.⁵¹ Jackson, furthermore, saw no difference between the graduate school cases and the system of segregated elementary and secondary schools.⁵² Concluding his thoughts, Jackson voted for the black plaintiffs but said: "My views are fluid enough to join any theory."⁵³ Jackson joined the Court's unanimous opinions in those cases, which used the Interstate Commerce Act to desegregate railroad cars⁵⁴ and said the separate black law school in Texas and the adjacent classroom in Oklahoma were not equal facilities.⁵⁵ The Justices, however, scrupulously avoided overruling *Plessy* and left the constitutionality of racially "separate but equal" facilities to another day.⁵⁶

More than two years later and immediately after four days of oral argument about racial segregation in primary and secondary schools (and presumably after reading Rehnquist's memo), Jackson sounded the same alarm bells at the Justices' December 13, 1952 conference. He said there was nothing in the text of the Constitution, nothing in the Court's prior decisions, and nothing in the history of the Fourteenth Amendment that says segregated

⁴⁹ See Chernack, *supra* note 4, at 51 (explaining Jackson's "institutional pragmatism").

⁵⁰ Burton Conference Notes on *McLaurin* at 5, Burton Papers, Box 182, Folder 1. In conference, Jackson often referred to a distinction between law and "politics." But Jackson used the word "politics" in the same way Benjamin Cardozo did, as synonymous with social policy. See ROBERT H. JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 54 (1955) (recounting Benjamin Cardozo's advice to him to join the New York Court of Appeals rather than the Supreme Court of United States: "[The New York Court of Appeals] is a great common law court; its problems are lawyers' problems. But the Supreme Court is occupied chiefly with statutory construction—which no man make can make interesting—and with politics." Jackson then wrote: "Of course, he used 'politics' in no sense of partisanship but in the sense of policy-making."); Robert H. Jackson, Interview with Harlan Phillips, at 992, Jackson Papers, Box 191, Folder 4 (recounting the same story and using the word "politics" as a synonym for policy).

⁵¹ Tom C. Clark, Conference Notes on *Sweatt*, *McLaurin*, *Henderson*, at 3, Tom C. Clark Papers, Tarlton Law Library, University of Texas at Austin [hereinafter Clark Papers], Box A2, Folder 3 (recounting the same story and using the word "politics" as a synonym for policy).

⁵² Douglas Conference Notes on *Henderson*, *supra* note 48, at 2.

⁵³ Clark Conference Notes on *Sweatt*, *McLaurin*, *Henderson* Notes, *supra* note 51 at 4.

⁵⁴ *Henderson*, 339 U.S. at 826.

⁵⁵ *Sweatt*, 339 U.S. at 635–36; *McLaurin*, 339 U.S. at 642.

⁵⁶ See, e.g., *Sweatt*, 339 U.S. at 635–36.

schools are unconstitutional. Based on the Court's precedents, they should be upheld.⁵⁷ "Marshall's brief," he said, "starts and ends with sociology."⁵⁸ He mentioned his lack of experience with segregation growing up in Jamestown, New York, and described the library controversy he resolved as attorney general with white lawyers, including Catholics and Jews, keeping blacks out of the D.C. Bar's library.⁵⁹ Jackson feared violence and bloodshed, which Justice Black had warned his colleagues about, if the Court ordered immediate school desegregation.⁶⁰ At the same time, Jackson knew that "segregation is nearing an end."⁶¹ He concluded by saying he could go along with the Court saying that segregation is "bad," enlisting the support of Congress, and phasing in desegregation over a period of years.⁶²

With a new Chief Justice in Earl Warren and another round of oral argument about the school desegregation cases in 1953, Jackson again voiced his concerns that the Court should not be thwarting the popular will. He described the case as a "political question," meaning the Justices were making a policy decision.⁶³ The history, custom, and precedent about the Fourteenth Amendment prevented them from carrying out a "judicial act." "If we have to decide this question," he said, "then representative government has failed."⁶⁴ But Jackson said he could "go along with" a policy decision in favor of school desegregation as long as the Justices specified how to enforce it.⁶⁵

Jackson's observation that "representative government has failed" was right on point.⁶⁶ Private all-white primaries, poll taxes, grandfather clauses,

⁵⁷ Clark 1952 Conference Notes on *Brown* at 3–4, Clark Papers, Box A27, Folder 4; Douglas 1952 Conference Notes on *Brown* at 4, Dec. 13, 1952, Douglas Papers, Box 1150, Folder "Original Conference Notes"; Burton 1952 Conference Notes on *Brown* at 7, Dec. 13, 1952, Burton Papers, Box 251, Folder 10.

⁵⁸ Clark 1952 Conference Notes on *Brown*, *supra* note 57, at 3; Burton 1952 Conference Notes on *Brown*, *supra* note 57, at 7.

⁵⁹ Burton 1952 Conference Notes on *Brown*, *supra* note 57, at 7.

⁶⁰ *Id.*

⁶¹ Douglas 1952 Conference Notes on *Brown*, *supra* note 57, at 4.

⁶² Clark 1952 Conference Notes on *Brown*, *supra* note 57, at 4; Burton 1952 Conference Notes on *Brown*, *supra* note 57, at 7.

⁶³ *See supra* note 50.

⁶⁴ Douglas 1953 Conference Notes on *Brown* at 4, Dec. 12, 1953, Douglas Papers, Box 1150, Folder "Original Conference Notes." *See also* Reed 1953 Conference Notes on *Brown*, Stanley Forman Reed Collection, Margaret I. King Library, University of Kentucky, Box 41, Folder "Certiorari Memos" ("Legislative has failed so come to Court").

⁶⁵ Burton 1953 Conference Notes on *Brown* at 6–7, Dec. 12, 1953, Burton Papers, Box 251, Folder 10.

⁶⁶ *See supra* note 64.

other forms of state-sanctioned disenfranchisement, unsanctioned voter intimidation, and white violence prevented blacks (and poor whites) from voting. He was also correct in believing that, in an ideal world in which all minority groups were fairly represented, Congress was better suited to eradicate segregation than the Court. But in 1954 Congress did not represent all the people. The Court had not yet declared "one man, one vote" the law of the land; the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Twenty-Fourth Amendment were more than a decade away.

After the 1953 oral argument, Jackson attempted to express some of his concerns in a twenty-three-page draft concurrence. "The plain fact is that questions of constitutional interpretation and of limitations or responsible use of judicial power in a federal system implicit in these cases are as far-reaching as any that have been before the Court since its establishment," he wrote.⁶⁷ Jackson wrote that the history of the Fourteenth Amendment, the Court's precedents, and custom did not outlaw segregated schools. He believed that Congress had more power to end segregated schools and that the Court was not the proper engine for social change. "To eradicate segregation by judicial action means two generations of litigation," he wrote.⁶⁸ "It is apparent that our decision does not end but begins the struggle over segregation."⁶⁹ Nor did he believe that trial judges should be saddled with enforcing the decision. But in the last two to three pages, Jackson wrote that changing conditions required the Court's intervention and a reinterpretation of the Fourteenth Amendment. He wrote that "Negro progress under segregation has been spectacular and, tested by the pace of history, his rise is one of the swiftest and most dramatic advances in the annals of man."⁷⁰ This rise, he wrote, "requires me to say that mere possession of colored blood, in whole or in part, no longer affords a reasonable basis for a classification for educational purposes and that each individual must be rated on his own merit."⁷¹ Jackson acknowledged that drafting a decree enforcing the decision would be problematic, but he concluded: "I am convinced that present-day conditions require us to strike from our books the doctrine of separate-but-equal facilities and to hold invalid provisions of state constitutions or statutes which classify persons for separate treatment in matters of education based solely on possession of colored blood."⁷² Jackson overcame his majoritarian concerns in two ways:

67 Jackson Draft Concurrence at 4, Mar. 15, 1954, Jackson Papers, Box 184, Folder 8.

68 *Id.* at 14.

69 *Id.*

70 *Id.* at 20.

71 *Id.* at 21.

72 *Id.* at 22.

(1) insisting that blacks had come a long way since slavery and were then somehow more equal than they had been during Reconstruction; and (2) overruling *Plessy* based on a limited anti-classification (as opposed to anti-subordination) principle as it relates to “separate treatment on matters of education.”⁷³

Jackson showed his March 15 draft concurrence to his lone law clerk that term, E. Barrett Prettyman Jr., who wrote a brilliant eight-page memo criticizing the draft as too pessimistic.⁷⁴ None of the other Justices ever saw Jackson’s concurrence. Prettyman assumed that Jackson was rewriting it, but Jackson never had much of a chance.⁷⁵ On March 30, 1954, he suffered a heart attack and was admitted for a prolonged stay at Doctors Hospital.⁷⁶ Warren personally brought the first draft of the Court’s landmark *Brown v. Board of Education*⁷⁷ decision to Jackson’s hospital bedside.⁷⁸ Prettyman waited in the hallway while the two Justices talked. Jackson liked the opinion’s simplicity, straightforwardness, and the great care it took not to blame the South.⁷⁹ After Warren left, Jackson showed the opinion to Prettyman.⁸⁰ They both agreed that the opinion was good but could use a little more law.⁸¹ Though Jackson made a dramatic return to the bench on May 17, 1954, for the announcement of the Court’s unanimous decision, he had few opportunities to expand on his majoritarian concerns before he died of a heart attack on October 9, 1954.⁸²

II. THE MAJORITY RULE ARGUMENT POST-*BROWN*

The majoritarian arguments in Rehnquist’s memo and in Jackson’s draft concurrence did not die with Jackson. First came the judges and academics who abhorred segregation yet worried about the implications of *Brown* on the

⁷³ Jackson Draft Concurrence at 4, Mar. 15, 1954, Jackson Papers, Box 184, Folder 8.

⁷⁴ E. Barrett Prettyman Jr., *Re: Nos. 1–4*, Jackson Papers, Box 184, Folder 5.

⁷⁵ Memorandum from E. Barrett Prettyman Jr. Dec. 15, 1954, University of Virginia Law Library, Box 2, Folder 2.

⁷⁶ JACKSON, *supra* note 50, at vii–viii.

⁷⁷ *Brown v. Bd. of Educ.*, 347 U.S. 483, 483 (1954).

⁷⁸ Interview with E. Barrett Prettyman Jr., Of Counsel, Hogan & Hartson, in Washington, D.C. (Sept. 18, 2006).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Jackson prepared but never had a chance to give three Harvard lectures that were edited by Prettyman and Jackson’s son William and posthumously published. JACKSON, *supra* note 50, at vii–viii.

scope of the Court's power. Jackson, in a posthumously published lecture, issued the first warning from the grave:

Of course, it would be nice if there were some authority to make everybody do the things we ought to have done and leave undone the things we ought not to have done. But are the courts the appropriate catch-all into which every such problem should be tossed? One can answer "Yes" if some immediate political purpose overshadows concern for the judicial institution. But in most such cases interference by the Court would take it into matters in which it lacks special competence, let alone machinery of implementation.⁸³

Other judges and scholars expressed their concerns about *Brown* more directly. "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians," Judge Learned Hand remarked in his 1958 Holmes lectures at Harvard.⁸⁴ *Brown* disturbed Hand because the Court overruled state segregation laws "by its own reappraisal of the relative values at stake."⁸⁵ Hand also acknowledged *Brown*'s interpretative void: "I have never been able to understand on what basis it does or can rest except as a *coup de main*."⁸⁶ Columbia law professor Herbert Wechsler, echoing Justice Jackson's concerns, criticized *Brown* as a naked political decision rather than one based on neutral legal principles.⁸⁷ Wechsler, like Hand, struggled to discern the legal principle underlying *Brown*, other than that freedom of association rights of blacks trumped those of whites.⁸⁸ Southern legislators also weighed in, charging in the Southern Manifesto that *Brown* was a "clear abuse of judicial power" and advocating resistance by "all lawful means."⁸⁹ Southern members of the Senate Judiciary Committee grilled some of President Eisenhower's Supreme Court nominees about *Brown*. Senator Eastland (D-Miss.) asked John Marshall Harlan II: "Do you believe the Supreme Court of the United States should change established interpretations of the Constitution to accord with the economic, political, or sociological views—[that is the personal views]—of [the judges] who from time to time

⁸³ JACKSON, *supra* note 50, at 55.

⁸⁴ LEARNED HAND, THE BILL OF RIGHTS 73 (1958).

⁸⁵ *Id.* at 54.

⁸⁶ *Id.* at 55.

⁸⁷ See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 33–34 (1959).

⁸⁸ *Id.* at 34. Scholars responded to Wechsler's argument by describing *Brown* in terms of anti-subordination. See Reva Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1489–97 (2004).

⁸⁹ 102 CONG. REC. 4515–16 (1956).

constitute the membership of the Court?"⁹⁰ Senator Sam Ervin (D-N.C.) explicitly lectured Potter Stewart about *Brown*, concluding in part, "if we are going to have a government of laws, rather than a government of men, and the rights of the people are to be preserved, I am not willing to trust my rights to a judicial oligarchy."⁹¹

The judicial opposition to *Brown* and the demand for majority rule continued to be led by Fourth Circuit Judge John J. Parker. Parker's argument had evolved since its pre-*Brown* incarnation. In 1951, he had written that the Justices should not read their sociological views into the Constitution.⁹² Conceding defeat of that argument four years later in a per curiam opinion in *Briggs v. Elliot*,⁹³ Parker advocated deference to school boards and freedom of parents to decide which schools their children should attend. Parker, probably encouraged by the Court's "all deliberate speed" language in *Brown II*,⁹⁴ wrote:

[I]t is important that we point out exactly what the Supreme Court has decided and what it has not decided in this case. It has not decided that the federal courts are to take over or regulate the public schools of the states. It has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the

⁹⁰ *Nomination of John Marshall Harlan, of New York, to be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 84th Cong. 140 (1955).

⁹¹ *Nomination of Potter Stewart to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 85th Cong. 131 (1959).

⁹² *Briggs v. Elliott*, 98 F. Supp. 529, 537 (E.D.S.C. 1951).

⁹³ *Briggs v. Elliott*, 132 F. Supp. 776, 777 (E.D.S.C. 1955) (per curiam) ("Whatever may have been the views of this court as to the law when the case was originally before us, it is our duty now to accept the law as declared by the Supreme Court.").

⁹⁴ *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955) (*Brown II*). The "all deliberate speed" language in *Brown II* came from Frankfurter, who was paying homage to his judicial idol Holmes. See Memorandum on the Segregation Decree 1955 & undated from Felix Frankfurter, Decree #2, undated, Felix Frankfurter Papers, Library of Congress, Manuscript Division, Box 219, Folder "Memorandum on the Segregation Decree: 1955 & undated," Reel 139, at 245; John Q. Barrett, *Introduction to Supreme Court Law Clerks' Recollections of Brown v. Board of Education II*, 79 ST. JOHN'S L. REV. 823, 835 n.37 (2005) (concluding the language in this memo probably came from Frankfurter); *Virginia v. West Virginia*, 222 U.S. 17, 19–20 (1911) ("[I]t is enough if it proceeds, in the language of the English Chancery, with all deliberate speed."); Letter from Oliver Wendell Holmes Jr. to Frederick Pollock (Mar. 7, 1909), in 1 HOLMES-POLLOCK LETTERS 152 (Mark DeWolfe Howe ed., 1941) (referring to *United States v. Shipp*, Holmes writes "in your chancery's delightful phrase, with all deliberate speed"). It was not an English chancery phrase, as Holmes claimed, but a line ("Deliberate speed, majestic instancy") from an 1893 poem by Francis Thompson. See Jim Chen, *Poetic Justice*, 28 CARDOZO L. REV. 581, 586 (2006).

right of choosing the schools they attend. What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains. . . . Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation. The Fourteenth Amendment is a limitation upon the exercise of power by the state or state agencies, not a limitation upon the freedom of individuals.⁹⁵

Parker recast his reading of the Equal Protection Clause as forbidding discrimination but not promoting integration, as a limit on the state's ability to discriminate but not on "local control" and majority rule. Some judges, such as Clement Haynsworth, upheld "freedom of choice" plans by adopting Parker's anti-discrimination and majoritarian rationale.⁹⁶

The Supreme Court continued to speak in one voice in upholding *Brown*, to assert its power of judicial review, and to overrule decisions of popularly elected officials. Per curiam opinions, without elaborating on *Brown*'s theoretical underpinnings, extended the ban on racial segregation from schools to a wide variety of public facilities.⁹⁷ *Cooper v. Aaron*,⁹⁸ with President Eisenhower and members of the 101st Airborne militarily

⁹⁵ *Briggs*, 132 F. Supp. at 777 (per curiam).

⁹⁶ See *Griffin v. Bd. of Supervisors*, 322 F.2d 332, 336 (4th Cir. 1963) ("Schools that are operated must be made available to all citizens without regard to race, but what public schools a state provides is not the subject of constitutional command."); *Bradley v. Sch. Bd.*, 345 F.2d 310, 316 (4th Cir. 1965) ("[T]he Fourteenth Amendment prohibition is not against segregation as such. The proscription is against discrimination. Everyone of every race has a right to be free of discrimination by the state by reason of his race. There is nothing in the Constitution which prevents his voluntary association with others of his race or which would strike down any state law which permits such association.").

Other lower federal judges such as John Minor Wisdom attempted to enforce *Brown* and refused to follow Parker's lead that *Brown* did not provide an affirmative duty to integrate the public schools. See *Singleton v. Jackson Mun. Separate Sch. Dist.*, 348 F.2d 729, 730 n.5 (5th Cir. 1965) (Wisdom, J.); *Singleton v. Jackson Mun. Separate Sch. Dist.*, 355 F.2d 865, 870-71 (5th Cir. 1966) (Wisdom, J.). Wisdom was joined by Frank Johnson, Richard Rives, Elbert Tuttle, and J. Skelly Wright as southern federal judges who, at great cost to their social lives and personal safety, tried to implement *Brown*. See JACK BASS, *UNLIKELY HEROES* 15-22 (1981).

⁹⁷ See, e.g., *Schiro v. Bynum*, 375 U.S. 395, 395 (1964) (auditorium); *Johnson v. Virginia*, 373 U.S. 61, 62 (1963) (public facilities); *State Athletic Comm'n v. Dorsey*, 359 U.S. 533, 554 (1959) (athletic events); *New Orleans City Park Improvement Ass'n v. Detiege*, 358 U.S. 54, 54 (1958) (parks); *Gayle v. Browder*, 352 U.S. 903, 903 (1956) (public transportation); *Holmes v. City of Atlanta*, 350 U.S. 879, 879 (1955) (golf course); *Mayor of Baltimore v. Dawson*, 350 U.S. 877, 877 (1955) (beaches).

⁹⁸ 358 U.S. 1, 1-3 (1958).

enforcing the decision, thwarted Arkansas Governor Orval Faubus's attempt to prevent the integration of Little Rock's Central High School.

It was not until the mid-1960s that the Court explicitly rejected Judge Parker's limited reading of *Brown*. The Court in *Griffin* overruled decisions of elected school board officials to close the schools altogether⁹⁹ and in *Green* outlawed their attempts to adopt "freedom of choice" plans that discouraged desegregation.¹⁰⁰ *Griffin* and *Green* trumped Parker's majoritarian argument.

After *Griffin* and *Green*, the majoritarian argument in Rehnquist's *Plessy* memo assumed less importance because federal judges began ordering school boards to produce plans for immediate school desegregation. Thus, the argument against *Brown* became less about deferring to elected officials and more about the scope of court-ordered desegregation plans. The Court's relative unanimity about enforcing *Brown* during the 1960s began to dissipate with the transition in the late 1960s and early 1970s from the Warren Court to the Burger Court. In April 1971, the Justices in *Swann* barely maintained their unanimity in affirming the Charlotte-Mecklenberg school district's court-ordered busing plan,¹⁰¹ but only by rewriting most of what became Chief Justice Burger's majority opinion.¹⁰² *Swann*, as Justice Breyer recently observed, placed its faith in democratically elected school board officials. The *Swann* Court said:

School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities.¹⁰³

Two years after *Swann*, however, the Court's unanimity crumbled, and Judge Parker's freedom of choice argument and his distinction between discrimination and integration resurfaced thanks to the Court's newest Justice.

⁹⁹ See *Griffin v. Sch. Bd.*, 377 U.S. 218, 219 (1964).

¹⁰⁰ See *Green v. Sch. Bd.*, 391 U.S. 430, 431 (1968).

¹⁰¹ See *Swann v. Bd. of Educ.*, 402 U.S. 1-4 (1971).

¹⁰² BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* 99-112 (1979).

¹⁰³ *Swann*, 402 U.S. at 16 (quoted in *Parents Involved in Community Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2811-12 (2007) (Breyer, J., dissenting)).

In *Keyes*, Justice William Brennan wrote for a five-justice majority that reversed the newly-elected Denver school board's freedom of choice plan.¹⁰⁴ It also ordered the district court to investigate whether the city's racially segregated schools were confined not just to the Park Hill area, as the district court had found, but the entire city. It found that school board officials, rather than segregating the schools because of state law, had committed racial gerrymandering and other intentional actions of segregation.

The newest Justice, William Rehnquist, was the only dissenter from the entire decision in *Keyes*. He found de jure segregation, the creation of dual white and black systems by state law, would be unconstitutional, but not de facto segregation in Denver.¹⁰⁵ The gerrymandering of one district, according to Rehnquist, did not create a dual school system.¹⁰⁶ Rehnquist believed that the Court had gone too far in *Green*, which according to Rehnquist, "makes it unmistakably clear that this significant extension of *Brown*'s prohibition against discrimination, and the conversion of that prohibition into an affirmative duty to integrate . . ."¹⁰⁷ It was one thing, Rehnquist said, for the Court to order integration of de jure segregated school systems in the South and quite another to apply it to de facto discrimination in Denver.¹⁰⁸ Rehnquist, furthermore, disagreed with the majority's factual findings of discriminatory intent on the part of the elected school board. "The Court has taken a long leap in this area of constitutional law in equating the district-wide consequences of gerrymandering individual attendance zones in a district where separation of the races was never required by law with statutes or ordinances in other jurisdictions which did so require," Rehnquist concluded.¹⁰⁹ Justice Brennan's majority opinion called out Rehnquist's pre-*Green* interpretation of the Court's school desegregation opinions as an anachronistic return to Judge Parker's 1955 formulation:

Our Brother Rehnquist argues in dissent that *Brown v. Board of Education* did not impose an "affirmative duty to integrate" the schools of a dual school system but was only a "prohibition against discrimination" "in the sense that the assignment of a child to a particular school is not made to depend on his race" That is the interpretation of *Brown* expressed 18 years ago by a three-judge court in *Briggs v. Elliott*, 132 F. Supp. 776, 777 (D.C.1955): "The Constitution, in other words, does not require integration.

¹⁰⁴ See *Keyes v. School Dist. No. 1*, 413 U.S. 189, 189 (1973). The school board had rescinded three resolutions by the previous board to re-draw the school district boundaries to make them racially integrated.

¹⁰⁵ *Id.* at 255-56 (Rehnquist, J., dissenting).

¹⁰⁶ *Id.* at 256 (Rehnquist, J., dissenting).

¹⁰⁷ *Id.* at 258 (Rehnquist, J., dissenting).

¹⁰⁸ See *id.* (Rehnquist, J., dissenting).

¹⁰⁹ *Id.* at 265 (Rehnquist, J., dissenting).

It merely forbids discrimination." But [*Green*] rejected that interpretation insofar as *Green* expressly held that "School boards . . . operating state-compelled dual systems were nevertheless clearly charged (by *Brown II*) with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Green* remains the governing principle.¹¹⁰

But it was Rehnquist's interpretation of *Brown*, not Brennan's, which would carry the day.

The following year in *Milliken v. Bradley* [*Milliken I*],¹¹¹ Brennan lost his majority, and the Court began to scale back the scope of judicial remedies in desegregating the nation's schools. Chief Justice Burger, joined by four other Justices including Rehnquist, reversed a district court judge's order that called for a merging of and busing between city and suburban school districts to remedy the city of Detroit's segregated schools. *Milliken I* marked the beginning of the end of *Green*'s mandate for integration. Judge Parker's formulation of *Brown* as forbidding intentional, state-sponsored discrimination but not ordering integration was beginning to carry the day. The argument in Rehnquist's *Plessy* memo that courts should defer to elected officials also was gaining favor as the courts and unelected judges were beginning to be taken out of the equation.

Having begun to wind down the integration experiment prompted by *Brown* and executed by *Green*, the Court next sought to articulate principles to govern future cases involving racial discrimination and school desegregation. First, in *Washington v. Davis*,¹¹² the Court imposed a discriminatory purpose or intent requirement for violations of the Equal Protection Clause.¹¹³ Then 30 years of affirmative action cases gave some Justices the opportunity to reinterpret the Equal Protection Clause to mean colorblindness and others the opportunity to reject that formulation.

The debate between deference to elected (or university) officials or some degree of colorblindness began in *Bakke*. Justice Brennan's concurring and dissenting opinion referred to Department of Health, Education, and Welfare findings and argued "the conclusion implicit in the regulations—that the

¹¹⁰ *Keyes*, 413 U.S. at 200 n.11 (citations omitted).

¹¹¹ 418 U.S. 717 (1974).

¹¹² 426 U.S. 229, 229–31 (1976).

¹¹³ See Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 318 (1987); David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 939 (1989); Barbara J. Flagg, "Was Blind, but Now I See": *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 961 (1993); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1111 (1997).

lingering effects of past discrimination continue to make race-conscious remedial programs appropriate means for ensuring equal educational opportunity in universities—deserves considerable judicial deference.”¹¹⁴ Justice Stevens’s concurring and dissenting opinion, which Justice Rehnquist joined, would have found a violation of Title VI the 1964 Civil Rights Act rather than confront the constitutional issues because, as Stevens noted, “[t]he doctrine reflects both our respect for the Constitution as an enduring set of principles and the deference we owe to the Legislative and Executive Branches of Government in developing solutions to complex social problems.”¹¹⁵

Brennan rejected a color blind reading of the 1964 Civil Rights Act as contrary to this country’s history of slavery, its failure to enforce the Equal Protection Clause, and its continuing struggle with racially segregated schools. “[C]laims that law must be ‘color-blind’ or that the datum of race is no longer relevant to public policy must be seen as aspiration rather than as description of reality,” he wrote.¹¹⁶ Brennan recognized that Justice Harlan’s sentence in his *Plessy* dissent about colorblindness “has never been adopted by this Court as the proper meaning of the Equal Protection Clause. Indeed, we have expressly rejected this proposition on a number of occasions.”¹¹⁷ Justice Thurgood Marshall also attacked the colorblindness argument from a historical perspective: “had the Court been willing in 1896, in *Plessy v. Ferguson*, to hold that the Equal Protection Clause forbids differences in treatment based on race, we would not be faced with this dilemma in 1978.”¹¹⁸ This historical context, or the lack of it in some instances, would be incredibly important when the affirmative action debate put the colorblindness argument and the argument about deferring to elected (and university) officials on a collision course.

In his dissenting opinion in *United Steelworkers v. Weber*, Justice Rehnquist argued that the majority had misread the plain language and legislative history of Title VII because it indicates that Congress intended for the statute to be color-blind.¹¹⁹ “Whether described as ‘benign discrimination’ or ‘affirmative action,’ the racial quota is nonetheless a creator of castes, a two-edged sword that must demean one in order to prefer another,” Rehnquist wrote.¹²⁰ “In passing Title VII, Congress outlawed all

¹¹⁴ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 373 (1978) (Brennan, J., concurring in part and dissenting in part).

¹¹⁵ *Id.* at 412 n.8.

¹¹⁶ *Id.* at 327.

¹¹⁷ *Id.* at 355–56 (citations omitted).

¹¹⁸ *Id.* at 401 (Marshall, J., dissenting).

¹¹⁹ 442 U.S. 193, 220 (1979) (Rehnquist, J., dissenting).

¹²⁰ *Id.* at 254 (Rehnquist, J., dissenting).

racial discrimination, recognizing that no discrimination based on race is benign, that no action disadvantaging a person because of his color is affirmative.”¹²¹ This was Rehnquist at his very best, carrying on the Holmesian tradition of positivism and deference to statutes written by elected officials. Rehnquist may have gotten the better of the statutory interpretation argument with Brennan, who relied on the “spirit” of Title VII to uphold voluntary affirmative action programs.¹²² Congress, however, sided with Brennan’s majority opinion, passing the 1991 Civil Rights Act¹²³ to affirm the Court’s interpretations of Title VII in *Griggs v. Duke Power Company*¹²⁴ and *Weber* and reject the Court’s decision in *Wards Cove v. Antonio*.¹²⁵

On at least one occasion, majoritarianism continued to play a strong role in Rehnquist’s jurisprudence where he sided with elected officials and state courts in formulating school desegregation plans. Rejecting a request in chambers to stay a California Supreme Court decision, Rehnquist wrote: “While I have the gravest doubt that [the California Supreme Court] was *required* by the United States Constitution to take the action that it has taken in this case, I have it was very little doubt that it was *permitted* by the Constitution to take such action.”¹²⁶

The deference argument reemerges with great force and temporarily defeats the colorblindness rationale in *Fullilove v. Klutznick*, where a plurality of the Court upheld the constitutionality of a federal statute that required 10 percent of federal funding for public works projects go to minority-owned businesses.¹²⁷ “When we are required to pass on the constitutionality of an Act of Congress, we assume ‘the gravest and most delicate duty that this Court is called on to perform,’” Chief Justice Burger wrote in his plurality opinion, quoting Holmes.¹²⁸ “A program that employs racial or ethnic criteria, even in a remedial context, calls for close examination, yet we are bound to approach our task with appropriate deference to the Congress,” Burger wrote.¹²⁹ Burger’s plurality opinion, which differentiated between “a choice made by a single judge or a school

¹²¹ *Id.*

¹²² See William N. Eskridge Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 394 n.200 (1991) (noting that most academics tend to agree with Rehnquist’s dissent).

¹²³ 42 U.S.C. § 1981 (2006).

¹²⁴ 401 U.S. 424, 424–25 (1971).

¹²⁵ 490 U.S. 642, 642–44 (1989).

¹²⁶ *Bustop, Inc. v. Los Angeles Bd. of Educ.*, 439 U.S. 1380, 1383 (1978) (emphasis in original).

¹²⁷ 448 U.S. 448, 448–49 (1980).

¹²⁸ *Id.* at 472 (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927)).

¹²⁹ *Id.*

board” and “a considered decision of the Congress and the President,” deferred to congressional findings of past discrimination in the construction industry.¹³⁰ Burger’s deference tipped the scales in favor of the statute’s constitutionality.¹³¹ Justice Stewart’s dissent, which Rehnquist joined, began by quoting from Justice Harlan’s *Plessy* dissent and opined that “today’s decision is wrong for the same reason that *Plessy v. Ferguson* was wrong.”¹³² Stewart argued that no amount of deference would cure the constitutional violation at hand because “[t]he Fourteenth Amendment was adopted to ensure that every person must be treated equally by each State regardless of the color of his skin.”¹³³ By joining Stewart’s dissent, Rehnquist abandoned the argument in his *Plessy* memo. Deferring to popularly-elected officials no longer topped his agenda; colorblindness began to make its case.

In *City of Richmond v. J.A. Croson Company*, the Court showed much less deference to the Richmond City Council, striking down its requirement that thirty percent of city construction contracts go to minority-owned business.¹³⁴ Repeatedly acknowledging *Fullilove*’s deference to Congressional findings of past discrimination, Justice O’Connor’s plurality opinion in *Croson*, which Rehnquist joined, rejected the deference argument in all affirmative action cases: “The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis.”¹³⁵ Only Justice Scalia advocated strict scrutiny for all governmental racial classifications and advanced the colorblindness argument. “At least where state or local action is at issue, only a social emergency rising to the level of imminent danger to life and limb—for example, a prison race riot, requiring temporary segregation of inmates—can justify an exception to the principle embodied in the Fourteenth Amendment that ‘[o]ur Constitution is colorblind,’” Scalia wrote.¹³⁶ Scalia also drew the line at federal affirmative action programs, believing that such programs had no right under the Fourteenth Amendment to be initiated by state or local governments.¹³⁷ Stewart’s opinion in *Fullilove* and Scalia’s dissent in *Croson* began the rewriting of the purpose of the Fourteenth Amendment as if it had embodied Harlan’s dissent.

¹³⁰ *Id.* at 473.

¹³¹ *Id.*

¹³² *Id.* at 523 (Stewart, J., dissenting).

¹³³ *Fullilove*, 448 U.S. at 531 (Stewart, J., dissenting).

¹³⁴ 488 U.S. 469, 469–70 (1989).

¹³⁵ *Id.* at 501 (plurality op.) (citing *Korematsu v. United States*, 323 U.S. 214, 235–40 (1944) (Murphy, J., dissenting)).

¹³⁶ *Id.* at 521 (Scalia, J., concurring in judgment) (citations omitted).

¹³⁷ *Id.*

The federal/state distinction was reinforced by the Court's decision in *Metro Broadcasting v. FCC* upholding two of the FCC's minority preference policies.¹³⁸ "The FCC's conclusion that there is an empirical nexus between minority ownership and broadcasting diversity is a product of its expertise, and we accord its judgment deference," Justice Brennan wrote for a five-justice majority.¹³⁹ Justice Kennedy's dissent, joined by Justice Scalia, began with *Plessy* and claimed that Brennan's opinion "exhumes *Plessy*'s deferential approach to racial classifications."¹⁴⁰ Kennedy concluded by returning to Harlan's dissent as the prophetic and proper interpretation of the Fourteenth Amendment.¹⁴¹ *Metro Broadcasting* ratcheted up the rhetoric, with the minority accusing the majority of betraying *Brown* and returning to the logic of *Plessy*.¹⁴²

The Court abandoned its deference to federal laws and agencies with Justice O'Connor's majority opinion in *Adarand Constructors, Inc. v. Peña*, applying strict scrutiny to a Department of Transportation regulation providing contractors with financial incentives for hiring minority subcontractors.¹⁴³ Justice Ginsburg's dissent, which Justice Breyer joined, lamented that the Court had abandoned its deferential stance. "[I]n view of the attention the political branches are currently giving the matter of affirmative action, I see no compelling cause for the intervention the Court has made in this case," Ginsburg wrote.¹⁴⁴ Her dissent also provided much needed context about Harlan's *Plessy* dissent, reviewing congressional authority to pass civil rights legislation and contrasting the "we are just one race" formulation in Scalia's concurrence with Harlan's language about the "white race" as "the dominant race in this country."¹⁴⁵ But, given *Adarand*'s strict scrutiny standard for all affirmative action programs, federal, state, or local, deference was falling by the wayside, and Harlan's colorblindness rationale was gaining ground.

¹³⁸ 497 U.S. 547, 552 (1990).

¹³⁹ *Id.* at 570.

¹⁴⁰ *Id.* at 632 (Kennedy, J., dissenting).

¹⁴¹ *Id.* at 637 ("Though the racial composition of this Nation is far more diverse than the first Justice Harlan foresaw, his warning in dissent is now all the more apposite: 'The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law.'" (quoting *Plessy*, 163 U.S. at 560 (Harlan, J., dissenting))).

¹⁴² *Id.* at 631-32.

¹⁴³ 515 U.S. 200, 201 (1995).

¹⁴⁴ *Id.* at 271 (Ginsburg, J., dissenting).

¹⁴⁵ *Id.* at 272 (quoting *id.* at 239 (Scalia, J., concurring in part and concurring in the judgment)); *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

Conservative Justices returned to the majoritarian arguments of state and local control in *Missouri v. Jenkins*.¹⁴⁶ *Jenkins* was something of a throwback—a district judge ordering the state to increase teacher salaries and fund “quality education” programs because of the vestiges of state-sponsored segregation.¹⁴⁷ Chief Justice Rehnquist’s majority opinion, citing the Court’s decisions in *Milliken I & II*, held that the district court had exceeded its authority.¹⁴⁸ Rehnquist’s opinion directed the district court “that its end purpose is not only ‘to remedy the violation’ to the extent practicable, but also ‘to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution.’”¹⁴⁹ Basically, Rehnquist made a local control argument similar to the one in his *Plessy* memo. The most memorable aspect of that case was the first line of Justice Clarence Thomas’s concurring opinion: “It never ceases to amaze me that the courts are so willing to assume that anything that is predominantly black must be inferior.”¹⁵⁰ Thomas argued that judicial power had spiraled out of control, sounding much like Holmes or Rehnquist the law clerk. “Usurpation of the traditionally local control over education not only takes the judiciary beyond its proper sphere, it also deprives the States and their elected officials of their constitutional powers,” Thomas wrote. “At some point, we must recognize that the judiciary is not omniscient, and that all problems do not require a remedy of constitutional proportions.”¹⁵¹

The return of the affirmative action debate marked the end of the conservative arguments about deferring to local control and majority rule (or, in this case, state university officials). In *Grutter v. Bollinger*, Justice O’Connor’s majority opinion saved affirmative action for another day.¹⁵² Her opinion held that the University of Michigan Law School had a compelling interest in having a diverse student body, and its admission program was narrowly tailored enough to survive strict scrutiny.¹⁵³ “The Court defers to the Law School’s educational judgment that diversity is essential to its educational mission. . . . Our holding today is in keeping with our tradition of giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits,” O’Connor wrote.¹⁵⁴ Justice Thomas’s dissent, joined by Justice Scalia, began by quoting Frederick Douglass and

¹⁴⁶ 515 U.S. 70 (1995).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 87–103.

¹⁴⁹ *Id.* at 102 (internal citations omitted).

¹⁵⁰ *Id.* at 114 (Thomas, J., concurring).

¹⁵¹ *Id.* at 138 (Thomas, J., dissenting).

¹⁵² 539 U.S. 306, 334–35 (2003).

¹⁵³ *See id.*

¹⁵⁴ *Id.* at 308, 328.

expressed Thomas's belief that "blacks can achieve in every avenue of American life without the meddling of university administrators."¹⁵⁵ He blasted the majority opinion's deference to the law school as inappropriate in strict scrutiny cases.¹⁵⁶ Justice Thomas concluded by arguing that *Grutter* had done violence to the Equal Protection Clause, which he defined by quoting Harlan's *Plessy* dissent.¹⁵⁷

In *Grutter*, Chief Justice Rehnquist did not choose between deference to a state-run university or colorblindness. Relying on the law school's admissions data, he argued that the admissions program was not narrowly tailored and was merely designed to achieve unconstitutional "racial balancing."¹⁵⁸ Rehnquist's majority opinion carried the day (winning O'Connor's vote) in a companion case, *Gratz v. Bollinger*,¹⁵⁹ that held that the admissions program for the University of Michigan's College of Literature, Arts, and Science was not narrowly tailored. But the main event for the Court, the American legal community, and the public, was the *Grutter* Court's upholding of affirmative action on diversity grounds.

In this case as well as several others, Rehnquist ended his judicial career in a much more pragmatic posture.¹⁶⁰ He had lost his majority in *Grutter* to O'Connor, abandoned his Holmesian position of deferring to majority rule in his law clerk memo, and hewed more to the discrimination/integration distinction in Judge Parker's 1955 per curiam opinion. He never championed color blindness over deference to majority rule as consistently as Scalia and Thomas. His death in 2005 caused him to miss another opportunity to take a stand.

III. THE SHOWDOWN IN *PARENTS INVOLVED*: MAJORITY RULE VS. COLORBLINDNESS

Parents Involved combined the affirmative action/diversity and school desegregation debates and forced the Court to choose between majority rule and colorblindness.¹⁶¹ School board officials in Seattle and Louisville voluntarily adopted school assignment plans in attempting to make their

¹⁵⁵ *Id.* at 350 (Thomas J., dissenting).

¹⁵⁶ *See id.* at 362–64 (Thomas J., dissenting).

¹⁵⁷ *See id.* at 378 (Thomas J., dissenting).

¹⁵⁸ *Id.* at 379 (Rehnquist, J., dissenting).

¹⁵⁹ 539 U.S. 244, 275 (2003).

¹⁶⁰ *See* *Dickerson v. United States*, 530 U.S. 428, 444 (2000) (upholding *Miranda*); *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 739–40 (2000) (upholding the Family Medical Leave Act); Reva Siegel, "You've Come A Long Way Baby": *Rehnquist's New Approach to Pregnancy Discrimination in Hibbs*, 58 STAN. L. REV. 1871, 1897–98 (2006).

¹⁶¹ *Parents Involved*, 127 S. Ct. 2738, 2767–68 (2007).

schools more racially diverse.¹⁶² In the absence of a judicial order to integrate, *Parents Involved* provided the ideal vehicle for deciding whether deference to public officials trumped the colorblindness reinterpretation of the Fourteenth Amendment. Colorblindness nearly won—with one vote shy of a majority.

Chief Justice Roberts's plurality opinion rejected the ideas in his former boss's *Plessy* memo and advanced in Justice Breyer's dissent: that the Court should defer to popularly-elected school boards.¹⁶³ "Such deference," Roberts wrote, "'is fundamentally at odds with our equal protection jurisprudence. We put the burden on state actors to demonstrate that their race-based policies are justified.'"¹⁶⁴

In fact, both sides accused the other of betraying *Brown*. Chief Justice Roberts cites some of the arguments from the *Brown* plaintiffs' briefs that equate *Brown* with anti-discrimination or colorblindness.¹⁶⁵ Roberts concludes: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."¹⁶⁶ Justice Thomas's concurrence takes the colorblindness argument even further: "Disfavoring a color-blind interpretation of the Constitution, the dissent would give school boards a free hand to make decisions on the basis of race—an approach reminiscent of that advocated by the segregationists in [*Brown*]."¹⁶⁷ Thomas squarely pitted Breyer's deference argument against colorblindness:

Most of the dissent's criticisms of today's result can be traced to its rejection of the color-blind Constitution. The dissent attempts to marginalize the notion of a color-blind Constitution by consigning it to me and Members of today's plurality. . . . But I am quite comfortable in the company I keep. My view of the Constitution is Justice Harlan's view in *Plessy* And my view was the rallying cry for the lawyers who litigated *Brown*.¹⁶⁸

Thomas repeatedly linked Breyer's arguments to arguments in the briefs of the lawyers for the segregationist states in *Brown* about deferring to the expertise of the local school boards and by relying on the Court's precedents.¹⁶⁹ "What was wrong in 1954 cannot be right today," Thomas

¹⁶² *Id.* at 2746.

¹⁶³ *Id.* at 2811, 2826–27, 2835–36 (Breyer, J., dissenting).

¹⁶⁴ *Id.* at 2766.

¹⁶⁵ *Id.* at 2768.

¹⁶⁶ *Id.*

¹⁶⁷ *Parents Involved*, 127 S. Ct. at 2768 (Thomas, J., concurring).

¹⁶⁸ *Id.* at 2782–2783 (citations omitted).

¹⁶⁹ *Id.* at 2783–86.

wrote.¹⁷⁰ Thomas accused Breyer of trying to read his own theories into the Fourteenth Amendment. "In place of the color-blind Constitution, the dissent would permit measures to keep the races together and proscribe measures to keep the races apart," Thomas wrote. "Although no such distinction is apparent in the Fourteenth Amendment, the dissent would constitutionalize today's faddish social theories that embrace that distinction. The Constitution is not that malleable."¹⁷¹ Thomas rejected Breyer's suggestion of leaving it up to elected school board officials to choose among competing social theories because that would "abdicate our constitutional responsibilities."¹⁷² "[H]istory," according to Thomas, "has taught us to beware of elites bearing racial theories."¹⁷³ Viewing colorblindness as a constitutional command rather than his preferred social theory, Thomas concluded his concurrence by quoting the colorblindness line from Justice Harlan's *Plessy* dissent.¹⁷⁴

Chief Justice Roberts's and Justice Thomas's arguments about colorblindness, however, did not win over the Court's most important voter and majority of one—Justice Kennedy. Kennedy, playing the role of Justice Powell in *Bakke*, described Roberts's opinion as "an all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account."¹⁷⁵ Nor did Kennedy buy into Justice Harlan's colorblindness rationale as the meaning of the Fourteenth Amendment's Equal Protection Clause: "[A]s an aspiration, Justice Harlan's axiom must command our assent. In the real world, it is regrettable to say, it cannot be a universal constitutional principle."¹⁷⁶

Kennedy, though contradicting his *Metro Broadcasting* dissent,¹⁷⁷ is right as a historical matter that Harlan's "color-blind Constitution" is nothing more than a turn of phrase. As Paul Freund put it, "the color-blind test is not a term

¹⁷⁰ *Id.* at 2786.

¹⁷¹ *Id.* at 2787; see also *id.* at 2778–79 n.14 (Thomas, J. concurring) ("It should escape no one that behind Justice Breyer's veil of judicial modesty hides an inflated role for the Federal Judiciary. The dissent's approach confers on judges the power to say what sorts of discrimination are benign and which are invidious. Having made that determination (based on no objective measure that I can detect), a judge following the dissent's approach will set the level of scrutiny to achieve the desired result. Only then must the judge defer to a democratic majority. In my view, to defer to one's preferred result is not to defer at all.").

¹⁷² *Id.* at 2779, 2788 (Thomas, J., concurring).

¹⁷³ *Parents Involved*, 127 S. Ct. at 2787 (Thomas, J., concurring) (citing *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857)).

¹⁷⁴ *Id.* at 2788 (Thomas, J., concurring) (citing *Plessy v. Ferguson*, 63 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

¹⁷⁵ *Id.* at 2791 (Kennedy, J., concurring).

¹⁷⁶ *Id.* at 2792 (Kennedy, J., concurring).

¹⁷⁷ See *supra* text accompanying notes 138–140.

of art found in the Constitution but a phrase from the first Mr. Justice Harlan's dissenting opinion in *Plessy v. Ferguson*, or more precisely a phrase taken by him from the brief filed in that case by the gifted novelist-lawyer Albion Tourg  e."¹⁷⁸ Freund went on to compare colorblindness with "liberty of contract" and concluded: "Equal protection, not color blindness, is the constitutional mandate, and the experience with liberty of contract should caution against an absolute legal criterion that ignores practical realities."¹⁷⁹

Harlan's *Plessy* dissent is fraught with multiple meanings. Immediately before his insistence that "[o]ur Constitution is color-blind," Harlan invokes the anti-caste or anti-subordination principle by saying: "There is no caste here."¹⁸⁰ And immediately before that, Harlan reveals the prejudices of his time: "The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power."¹⁸¹ Nor is colorblindness easily reconcilable with an originalist interpretation of the Fourteenth Amendment.¹⁸² For now, Kennedy's repudiation of colorblindness carries the day.

Justice Breyer, though not able to persuade Justice Kennedy to transform his dissent into a majority opinion, wrote a modern-day Brandeis brief in reciting the history of the efforts of Seattle and Louisville officials to remedy the racial segregation in the schools.¹⁸³ He showed how *Swann* and the Court's other precedents have allowed school districts to use race-conscious programs to remedy segregation.¹⁸⁴ He also directed the Court to "the basic objective of those who wrote the Equal Protection Clause as forbidding practices that lead to racial exclusion."¹⁸⁵ The framers of the Fourteenth Amendment, Breyer argued, "understood the legal and practical difference between the use of race-conscious criteria in defiance of that purpose, namely to keep the races apart, and the use of race-conscious criteria to further that purpose, namely to bring the races together."¹⁸⁶ Breyer addressed the contention that colorblindness defines the Equal Protection Clause: "I can find no case in which this Court has followed Justice Thomas's 'colorblind'

¹⁷⁸ Paul A. Freund, *Dedication-1964, Constitutional Dilemmas*, 45 B.U. L. REV. 13, 20 (1965).

¹⁷⁹ *Id.*

¹⁸⁰ *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

¹⁸¹ *Id.*

¹⁸² See Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753, 789-98 (1985); David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99, 100 (1986).

¹⁸³ See *Parents Involved*, 127 S. Ct. at 2816 (Breyer, J., dissenting).

¹⁸⁴ *Id.* at 1869.

¹⁸⁵ *Id.* at 2815.

¹⁸⁶ *Id.*

approach.”¹⁸⁷ And he described Chief Justice Roberts’s decision to ignore *Grutter* because it dealt with higher education as “not a meaningful legal distinction.”¹⁸⁸

Justice Breyer concluded in part with a Holmesian plea for deference to elected officials:

And what of respect for democratic local decisionmaking by States and school boards? For several decades this Court has rested its public school decisions upon *Swann*’s basic view that the Constitution grants local school districts a significant degree of leeway where the inclusive use of race-conscious criteria is at issue. Now localities will have to cope with the difficult problems they face (including resegregation) deprived of one means they may find necessary.¹⁸⁹

Breyer pointed out Justice Thomas’s own use of social science data was problematic, but he concluded that who is right about the data should not matter: “I believe only that the Constitution allows democratically elected school board officials to make up their own minds as to how best to include people of all races in one America.”¹⁹⁰ Breyer also took on Thomas’s reading of history, rebutting Thomas’s contention that Breyer’s argument was the same as those of the lawyers for pre-*Brown* segregationists.¹⁹¹ Breyer read the Fourteenth Amendment as embodying an anti-caste or anti-subordination

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 2829; see *id.* at 2754 (contending that in *Grutter* “this Court relied upon considerations unique to institutions of higher education . . .”). The best insight came from Justice Stevens’s dissent, suggesting that we scrap the three tiers of scrutiny in order to liberate the Constitution’s Equal Protection jurisprudence. *Id.* at 2799 (Stevens, J. dissenting) (“If we look at cases decided during the interim between *Brown* and *Adarand*, we can see how a rigid adherence to tiers of scrutiny obscures *Brown*’s clear message.”).

¹⁸⁹ *Parents Involved*, 127 S. Ct. at 2835–36 (Breyer, J., dissenting). At times in his dissent, Breyer invokes Holmes. Compare *id.* at 2816 (Breyer, J., dissenting) (“Law is not an exercise in mathematical logic.”) with OLIVER WENDELL HOLMES JR., *THE COMMON LAW* 1 (1881) (“The life of the law has not been logic; it has been experience.”) (citations omitted).

Breyer cites Holmes’s *Lochner* dissent, among other authorities, for his deferential, democratic-reinforcing, judicial philosophy that he calls “active liberty.” STEPHEN BREYER, *ACTIVE LIBERTY* 17 & 139 n.1 (2005) Breyer defines “active liberty” as “the need to make room for democratic decision-making.” *Id.* at 37. In discussing affirmative action and Justice O’Connor’s opinion in *Grutter*, Breyer wrote: “When faced with one interpretation of the Equal Protection Clause that, through efforts to include, would facilitate the functioning of a democracy and a different interpretation of the Equal Protection Clause that, through perceived exclusion, might impede the functioning of a democracy, is it surprising that the Court chose the former?” *Id.* at 83.

¹⁹⁰ *Parents Involved*, 127 S. Ct. at 2824 (Breyer, J., dissenting).

¹⁹¹ *Id.* at 2836.

principle. Segregation, Breyer wrote, "perpetuated a caste system rooted in the institutions of slavery and 80 years of legalized subordination. The lesson of history . . . is not that efforts to continue racial segregation are constitutionally indistinguishable from efforts to achieve racial integration."¹⁹² Finally, Breyer worried about the future of *Brown*: "The last half-century has witnessed great strides toward racial equality, but we have not yet realized the promise of *Brown*. To invalidate the plans under review is to threaten the promise of *Brown*. The plurality's position, I fear, would break that promise. This is a decision that the Court and the Nation will come to regret."¹⁹³

Brown is not in any danger of being overruled, but, as *Parents Involved* showed, its interpretation remains up for grabs in a debate where one side usually invokes Holmesian deference to majority rule. Pleas for deference to political processes are often made when the Constitution does not provide a clear substantive norm, when one side in the argument disagrees with the substantive norm, or when the preferred substantive norm requires discretion. During his December 1952 argument in *Brown*, John W. Davis advocated local control of the schools/deference to majority rule because his clients disagreed with the substantive norm of not segregating public schools on the basis of race, and because their preferred norm of racially separate schools depended on the discretion of school officials. In *Parents Involved*, Justice Breyer invoked majority rule because he, too, was defending a discretionary norm, albeit a completely different one from the segregationists, that a school district may voluntarily take race into account to promote racial diversity.¹⁹⁴ Justice Breyer's belief in majority rule is not uncommon. Justice Thomas in *Missouri v. Jenkins* and Justice Rehnquist in *Keyes* and *Milliken I & II* appealed to local control/majority rule when the substantive norm, achieving racial desegregation in the public school system, conflicted with their desire to relax the judicial remedies to achieve desegregation.¹⁹⁵ In other contexts, Justice Thomas and other Justices have advocated a clear rule (colorblindness in the context of affirmative action) and therefore have not needed the majoritarian argument. Justice Breyer's invocation of majority rule does not make him a 1950s-style segregationist. Chief Justice Roberts and Justice Thomas's claim to this effect in *Parents Involved* ignores

¹⁹² *Id.*

¹⁹³ *Id.* at 2837.

¹⁹⁴ *Parents Involved*, 127 S. Ct. at 2801 (Breyer, J., dissenting).

¹⁹⁵ *Missouri v. Jenkins*, 515 U.S. 70, 87-89 (1995); *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 256 (1976) (Rehnquist, J., dissenting); *Milliken v. Bradley*, 433 U.S. 267, 294 (1977) (Rehnquist, J., dissenting).

important differences in historical, political, and legal context.¹⁹⁶ Justice Breyer invoked majority rule because he supported a discretionary substantive norm, not, like Justice Holmes, because he believed in majority rule as a substantive norm in and of itself.

IV. CONCLUSION

Holmes was committed, as no Justice on today's Court is, to majority rule as a substantive norm.¹⁹⁷ It is impossible to discern exactly what type of opinion Holmes would have written in *Parents Involved*. Not a very good one. For starters, his mind would not have been very sharp because he would have been 166 years old. Holmes was a man of his times. His hostility to civil rights claims, particularly from 1903 to 1916, is well-documented.¹⁹⁸ He also was not a fan of the first Justice Harlan's jurisprudence, describing Harlan's mind as "a powerful vise, the jaws of which couldn't be got nearer than two inches to each other."¹⁹⁹ Nor was Holmes enamored with the Equal Protection Clause, which he referred to as "the last resort of constitutional argument."²⁰⁰ But such a brief cataloguing of Holmes's beliefs is to judge him too harshly and ahistorically. He was open to new ideas throughout his life and did not live to see how the New Deal, *Brown*, and the civil rights revolution changed the Constitution.

Rather than just a foolhardy exercise in historical presentism (and a bit of fun), asking what Justice Holmes would have done in *Parents Involved* revives the link first recognized by Paul Freund between liberty of contract and colorblindness.²⁰¹ Holmes's *Lochner* dissent undoubtedly led to Judge Parker's lower court opinion in *Briggs v. Elliott*, which led to John W. Davis's 1952 oral argument in *Brown* which inspired the legal argument in Rehnquist's infamous clerkship memo. More than fifty-five years after Rehnquist wrote a memo to Justice Jackson arguing for deference to majority rule and admonishing the Justices against reading their personal views into the Fourteenth Amendment, the argument is alive and well in *Parents Involved*. Justice Breyer advanced the memo's argument that we should defer to the decisions of state and local elected officials. Justice Thomas led a

¹⁹⁶ See Joel Goldstein, *Rewriting Brown: A Critique of Chief Justice Roberts's Opinion in Parents Involved*, 69 OHIO ST. L.J. 791, 793 (2008).

¹⁹⁷ Rehnquist came the closest to adhering to Holmes's majoritarianism, with Frankfurter carrying on the Holmesian legacy before him.

¹⁹⁸ See *supra* note 10.

¹⁹⁹ 2 HOLMES-POLLOCK LETTERS, *supra* note 94, at 8.

²⁰⁰ *Buck v. Bell*, 274 U.S. 200, 208 (1927).

²⁰¹ See text accompanying *supra* notes 178–79.

group of four Justices who believed that Justice Harlan's rhetorical statement should become the law of the land.

Holmes's choice would have been easy. Based solely on his *Lochner* dissent and his belief in majority rule as a substantive goal, he would have joined at least part of Breyer's dissent about deferring to elected officials. As for the four modern Justices advocating a color-blind Constitution, Holmes would have lumped them in with the *Lochner* majority that struck down state social reforms under a "liberty of contract" theory of the Due Process Clause and considered their ideas about color blindness part of the ideological warfare that he gave up after fighting in the Civil War. To paraphrase the concluding sentence in Rehnquist's memo, Holmes would have said that if the Fourteenth Amendment did not enact Mr. Herbert Spencer's Social Statics, it certainly did not enact the first Mr. Justice Harlan's "color-blind Constitution."

APPENDIX

A Random Thought on the Segregation Cases

One-hundred fifty years ago this Court held that it was the ultimate judge of the restrictions which the Constitution imposed on the various branches of the national and state government. Marbury v. Madison. This was presumably on the basis that there are standards to be applied other than the personal predilections of the Justices.

As applied to questions of inter-state or state-federal relations, as well as to interdepartmental disputes within the federal government, this doctrine of judicial has worked well. Where theoretically co-ordinate bodies of government are disputing, the Court is well suited to its role as arbiter. This is because these problems involve much less emotionally charged subject matter than do those discussed below. In effect, they determine the skeletal relations of the governments to each other without influencing the substantive business of those governments.

As applied to relations between the individual and the state, the system has worked much less well. The Constitution, of course, deals with individual rights, particularly in the First Ten and the Fourteenth Amendments. But as I read the history of this Court, it has seldom been out of hot water when attempting to interpret these individual rights. Fletcher v. Peck, in 1810, represented an attempt by Chief Justice Marshall to extend the protection of the contract clause to infant business. Scott v. Sanford was the result of Taney's effort to protect slaveholders from legislative interference.

After the Civil War, business interest came to dominate the Court, and they in turn ventured into the deep water of protecting certain types of individuals against legislative interference. Championed first by Field, then by Peckham and Brewer, the high water mark of the trend in protecting corporations against legislative influence was probably Lochner v. NY. To the majority opinion in that case, Holmes replied that the Fourteenth Amendment did not enact Herbert Spencer's Social Statics. Other cases coming later in a similar vein were Adkins v. Children's Hospital, Hammer v. Dagenhart, Tyson v. Banton, Ribnik v. McBride. But eventually the Court called a halt to this reading of its own economic views into the Constitution. Apparently it recognized that where a legislature was dealing with its own citizens, it was not part of the judicial function to thwart public opinion except in extreme cases.

In these cases now before the Court, the Court is, as Davis suggested, being asked to read its own sociological views into the Constitution. Urging a view palpably at variance with precedent and probably with legislative history, appellants seek to convince the Court of the moral wrongness of the treatment they are receiving. I would suggest that this is a question the Court need never reach; for regardless of the Justice's individual views on the merits of segregation, it quite clearly is not one of those extreme cases which commands intervention from one of any conviction.

If this Court, because its members individually are "liberal" and dislike segregation, now chooses to strike it down, it differs from the McReynolds court only in the kinds of litigants it favors and the kinds of special claims it protects. To those who would argue that "personal" rights are more sacrosanct than "property" rights, the short answer is that the Constitution makes no such distinction. To the argument made by Marshall that a majority may not deprive a minority of its constitutional right, the answer must be made that while this is sound in theory, in the long run it is the majority who will determine what the constitutional rights of the ~~majority~~ minority are. One hundred and fifty years of attempts on the part of this Court to protect minority rights of any kind--whether those of business, slaveholders, or Jehovah's Witnesses--have all met the same fate. One by one the cases establishing such rights have been sloughed off, and crept silently to rest. If the present Court is unable to profit by this example it must be prepared to see its work fade in time, too, as embodying only the sentiments of a transient majority of nine men.

I realize that it is an unpopular and unhumanitarian position, for which I have been excoriated by "liberal" colleagues, but I think Plessy v. Ferguson was right and should be re-affirmed. If the Fourteenth Amendment did not enact Spencer's Social Statics, it just as surely did not enact Myrdahl's American Dilemma.